Supreme Court, U. S.
FILED
APR 10 1979
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1978

No. 78-1392

JEANNE HARRINGTON,
Petitioner,

vs.

VANDALIA-BUTLER BOARD OF EDUCATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

LARRY A. SMITH
MICHAEL J. BURDGE
1400 One First National Plaza
P.O. Box 910
Dayton, Ohio 45402
513-224-1981
Attorneys for Respondent

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

TABLE OF CONTENTS

Questions Presented 2

Statement of the Case 2

Reasons for Denying the Writ—

1. The Decision of the Court of Appeals Does Not Conflict With Applicable Decisions of This Court; Rather It Is in Harmony With Such Decisions 6
2. The Decision of the Court of Appeals Does Not Conflict With the Decisions of Other Courts of Appeals As to the Availability of Monetary Relief Other Than Back Pay Under Title VII 9
3. The Court of Appeals Has Not Decided a Question of Federal Law Which Deserves Further Elucidation by This Court 14
4. The Decision of the Court of Appeals Does Not Conflict With the Decisions of This Court nor With the Decisions of Other Courts of Appeals As to Whether Petitioner Was a Prevailing Party 15
5. The Decision of the Court of Appeals Does Not Conflict With the Decisions of This Court Regarding the Availability of Declaratory Relief Under Title 28 United States Code §§2201 and 2202 17
6. The Decision of the Court of Appeals Does Not Conflict With the Decisions of This Court Regarding the Imposition of Costs on Appeal 18

Conclusion 19

TABLE OF AUTHORITIES

Cases

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) 6, 8, 9, 12, 15
Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) 17
Budinsky v. Corning Glass Works, 425 F. Supp. 786 (W.D. Pa. 1977) 17
Christianburg Garment Co. v. E.E.O.C., 434 U.S. 413 (1978) 16, 18
Compston v. Borden, Inc., 424 F. Supp. 157 (S.D. Ohio 1976) 14
Curran v. Portland Superintending School Committee, 435 F. Supp. 1063 (D. Me. 1977) 14
Curtis v. Loether, 415 U.S. 189 (1974) 6, 7, 15
Dual v. Griffin, 446 F. Supp. 791 (D. D.C. 1977) 10, 12
E.E.O.C. v. Detroit Edison Co., 515 F.2d 301 (6th Cir. 1975), *vacated on other grounds* 431 U.S. 951 (1977) 13
Evans v. Sheraton Park Hotel, 5 EPD ¶8079 (D. D.C. 1972) 10
Evans v. Sheraton Park Hotel, 503 F.2d 177 (D.C. Cir. 1974) 9, 10
Franks v. Bowman Transportation Co., 424 U.S. 747 (1976) 6, 8, 9, 15
Furnco Construction Corp. v. Waters, ... U.S. ....., 98 S. Ct. 2943 (1978) 5
Garner v. Giarrusso, 571 F.2d 1330 (5th Cir. 1978), *reh. den.* 575 F.2d 300 ..... 13, 15
Harmon v. May Broadcasting Company, 583 F.2d 411 (8th Cir. 1978) 13, 14
Humphrey v. Southwestern Portland Cement Co., 369 F. Supp. 832 (W.D. Tex. 1973), *rev'rsd on the merits* 488 F.2d 691 (5th Cir. 1974) 14-15

Hyland v. Kenner Products Co., 13 FEP Cases 1309 (S.D. Ohio 1976) 14
International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977) 5, 6, 8, 9, 15
Jiron v. Sperry Rand Corp., 423 F. Supp. 155 (D. Utah 1975) 14
Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969) 13
Katzenbach v. McClung, 379 U.S. 294 (1964) 17
Kober v. Westinghouse Electric Corp., 480 F.2d 240 (3rd Cir. 1973) 16
Lea v. Cone Mills Corporation, 438 F.2d 86 (4th Cir. 1971) 16-17
Loo v. Gerarge, 374 F. Supp. 1338 (D. Hawaii 1974) 12
Lorillard v. Pons, 434 U.S. 575 (1978) 7, 15
McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 5, 16
Pearson v. Western Electric Co., 542 F.2d 1150 (10th Cir. 1976) 11, 13, 14
Richerson v. Jones, 551 F.2d 918 (3rd Cir. 1977) 12, 13
Rosen v. Public Service Electric and Gas Co., 477 F.2d 90 (3rd Cir. 1973) 9, 11-12, 13
Rosenfeld v. Southern Pac. Co., 519 F.2d 527 (9th Cir. 1975) 16
Rutherford v. American Bank of Commerce, 565 F.2d 1162 (10th Cir. 1977), *aff'g* 11 EPD ¶10,829 (D. N.M. 1976) 9, 11
Saad v. Burns Intern. Sec. Services, Inc., 456 F. Supp. 33 (D. D.C. 1978) 10
Scott v. Anniston, 430 F. Supp. 508 (N.D. Ala. 1977) 5
Taylor v. Safeway Stores, Inc., 524 F.2d 263 (10th Cir. 1975) 16
Tidwell v. American Oil Co., 332 F. Supp. 424 (D. Utah 1971) 14

Tooles v. Kellogg Co., 336 F. Supp. 14 (D. Neb. 1972) 14
Van Hoomissen v. Xerox Corp., 368 F. Supp. 829 (N.D. Cal. 1973) 7, 8, 9
Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists, 401 F. Supp. 1363 (S.D. N.Y. 1975) 12

Constitutional Provisions and Statutes

U.S. Const., Amend. VII 6
Fed. R. App. P. 39(a) 19
28 U.S.C. §§2201 and 2202 (Declaratory Judgment Act) 2, 17
29 U.S.C. §151 *et seq.* (National Labor Relations Act) 7, 8
§160(c) 8
29 U.S.C. §621 *et seq.* (Age Discrimination in Employment Act) 6, 7
42 U.S.C. §2000e *et seq.* (Title VII, Civil Rights Act of 1964) .....*passim*
42 U.S.C. §706(g) 8, 9
42 U.S.C. §3601 *et seq.* (Title VIII, Fair Housing Act) 6, 7

Texts

Notes of the Advisory Committee on Federal Rules of Civil Procedure 57 17
SCHLEI & GROSSMAN, EMPLOYMENT DISCRIMINATION LAW (1976) 15

Supreme Court of the United States

October Term, 1978

No. 78-1392

JEANNE HARRINGTON,
Petitioner,

vs.

VANDALIA-BUTLER BOARD OF EDUCATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

Vandalia-Butler Board of Education, Respondent, opposes Harrington's Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

QUESTIONS PRESENTED

Respondent is satisfied with the Petitioner's summary of the questions presented for review, except insofar as question 1. implies that the Petitioner, as a Title VII plaintiff, proved "intentional sex discrimination". (See discussion below at page 5, note 1.)

STATEMENT OF THE CASE

Jeanne Harrington brought this action against her employer, the Vandalia-Butler Board of Education, alleging that she was subjected to discriminatory terms, conditions, and privileges of employment in violation of Title VII of the Civil Rights Act of 1964, Title 42 United States Code §§2000e *et seq.* (hereinafter "Title VII" or "the Act"). Harrington further sought a declaratory judgment pursuant to Title 28 United States Code §§2201 and 2202. The courts below found the following facts. In 1957, Respondent hired Petitioner to teach social studies. In 1958 or 1959, Petitioner was assigned to teach girls' physical education at Morton Junior High School (Appendix at p. A2).* Until 1966, both girls' and boys' physical education at Morton Junior High was taught in a "field house." Additionally, interscholastic competition was held in the field house. Due to a demand for seating space, in 1966, a portion of the field house was converted from instructional area to spectator bleachers. Thereafter, girls' physical education classes were moved to a "girls' gym" (Appendix at p. A4).

*Respondent's references of pages in the Appendix refer to the decisions of the courts below as set forth in the Appendix to the Petition for Writ of Certiorari.

As a consequence, the Respondent maintained separate facilities for instruction in physical education. Petitioner was the sole instructor in girls' physical education while instruction in physical education for boys was provided by two male teachers, each of whom devoted one-half of his time to physical education and the other half to academic subjects (Appendix at p. A3). Girls' gym classes were taught in the girls' gym and boys' gym classes were taught in the field house. The girls' gym was almost entirely underground, and, in contrast to the field house, it lacked natural light and ventilation, had a smaller gym floor area, had smaller shower and locker room facilities, and had a smaller unsecure office, and no private toilet or shower facilities for the teacher (Appendix at pp. A3, A11). The District Court found that Petitioner's working conditions were inferior to those of male teachers performing the same services (Appendix at p. A5).

For the academic year 1971-1972, Petitioner was evaluated by the principal of Morton Junior High School as "Average" (Appendix at p. A5). (This is hardly "high praise" as indicated by Petitioner at page 5 of her Petition.) However, in the Spring of 1972, relations between the Petitioner and the administrative officials of the Respondent substantially deteriorated. Said officials took exception to Petitioner's circulation of a survey regarding the physical education facilities and the enlistment of parents in her conflict with the administration. Between March 2, 1972, and May 17, 1972, eighteen separate annotations of unsatisfactory performance were entered in the Petitioner's file (Appendix at pp. A4-A5). The District Court found that such activity amounted to "surveillance" and "harassment," and interfered with Petitioner's instructional efforts (Appendix at p. A5).

In June, 1972, Respondent notified the Petitioner of her transfer to another school and assignment to teach social studies. Petitioner declined to accept such reassignment and accepted instead voluntary disability retirement. Petitioner is substantially disabled by a hearing loss and is physically unable to instruct students (Appendix at p. A2).

Thereafter, a joint use of the two gymnasia began with the institution of coeducational gym classes, all without material alteration of the facilities (Appendix at p. A4).

The District Court found that, since the Petitioner had failed to prove that she was penalized in terms of salary for work done equivalent to that of male teachers, that therefore she was not entitled to an award of back pay (Appendix at pp. A4, A7). Furthermore, Petitioner was not entitled to reinstatement because of her physical disability (Appendix at p. A7). However, the court found that Petitioner had been discriminated against with respect to her conditions of employment and entered judgment for the Petitioner in the amount of $6,000.00, as "appropriate compensation," together with costs and attorney fees (Appendix at pp. A7-A8).

Thereupon, Respondent prosecuted an appeal to the United States Court of Appeals for the Sixth Circuit. It is significant that Petitioner did not pursue a cross appeal based upon any action or failure to act by the trial court.

The Court of Appeals noted the different working conditions afforded Petitioner and found that "the intentionally discriminatory nature of the disparity was shown by evidence that when a male teacher was assigned to teach girls' physical education, he was assigned to the

larger gymnasium and was not required to move his offices or to work in the girls' gym" (Appendix at pp. A11-A12).[1] However, the court further held that compensatory damages of the type awarded by the trial court were not authorized by Title VII (Appendix at p. A19). The court further held that since Petitioner had failed to establish that she was entitled to any relief under the Act at the time suit was brought, that therefore, Petitioner was not a "prevailing party" and the District Court's award of attorney fees could not stand (Appendix at pp. A20-A21). The court reversed and remanded the case for entry of judgment in favor of the Respondent with costs of appeal taxed against the Petitioner (Appendix at p. A24).

---

1. Apparently in reliance on this language in the Court of Appeals' decision, the Petitioner repeatedly refers to "intentional sex discrimination" (Petition, pp. 2, 10) or "intentional violations of Title VII" (Petition, pp. 4, 7, 14, 15). It is submitted that such a "finding" by the Court of Appeals exceeded the bounds of appellate review and that the appellate court made a finding of fact which the trial court expressly refused to do. The trial court was under the erroneous opinion that a Title VII plaintiff need not prove intentional discrimination and that the motive of an employer was irrelevant as not part of a Title VII action (Appendix at pp. A6-A7). However, the contrary was made abundantly clear in this Court's recent decision in *Furnco Construction Corp. v. Waters*, ____ U.S. ____, 98 S. Ct. 2943 (1978), where the Court noted, at 2951, that "a *McDonnell Douglas* prima facie showing is not the equivalent of a factual finding of discrimination, ... Rather, it is simply proof of actions taken by the employer from which we infer discriminatory *animus*. . . ." (Emphasis added). Also see, *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 at 415, n.15 (1977) ("proof of discriminatory motive is critical"). In the instant case, the trial court expressly refused to make such an inference and held that a mere difference in treatment makes out a prima facie violation of Title VII (Appendix at pp. A5-A7). Thus, insofar as the Court of Appeals found intentional discrimination, it was not upholding any finding of the trial court. Rather, it went beyond the bounds of appellate review and made a finding sua sponte. (It is interesting to note that the trial court's decision in the instant case suffered severe criticism in *Scott v. Anniston*, 430 F. Supp. 508, 514-515 (N.D. Ala. 1977).)

REASONS FOR DENYING THE WRIT

1. The Decision of the Court of Appeals Does Not Conflict With Applicable Decisions of This Court; Rather It Is in Harmony With Such Decisions

As noted by Petitioner, this Court has never directly decided the issue of the scope of monetary relief available under Title VII.

However, this court has often made the general observation that Title VII is designed to arm the courts with full *equitable* powers. E.g., *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975); that "in determining the specific remedies to be afforded, a district court is to 'fashion such relief as the particular circumstances of a case may require to effect *restitution.*'" *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 364 (1977) (emphasis added); that "the fashioning of an appropriate remedy invokes the sound *equitable* discretion of the district courts." *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 770 (1976) (emphasis added).

Furthermore, this Court has drawn analogies between the relief available under Title VII as compared with that available under Title VIII, 42 United States Code §3601 *et seq.*, and the Age Discrimination in Employment Act, 29 United States Code §§621 *et seq.* (ADEA). In *Curtis v. Loether*, 415 U.S. 189 (1974) this Court decided that the Seventh Amendment to the United States Constitution entitles either party in a Title VIII action to demand a jury trial. Therein, this Court descredited an analogy between Title VIII and Title VII with the following discussion:

> "In Title VII cases, the courts of appeals have characterized back pay as an integral part of an equitable remedy, a form of restitution. But the statuory language [of Title VII] contrasts sharply with [Title VIII's] simple authorization of an action for actual and punitive damages. * * * Whatever may be the merit of the 'equitable' characterization in Title VII cases, there is surely no basis for characterizing the award of compensatory and punitive damages here as equitable relief." *Ibid.* at 197.

The Court also observed that actual and punitive damages were the traditional forms of relief offered in courts of law. *Ibid.* at 196.

Similarly, in *Lorillard v. Pons*, 434 U.S. 575 (1978), this Court decided that an ADEA plaintiff had a right to jury trial. The defendant had argued that the case law of Title VII was analogous authority for the opposite conclusion. This Court refuted that argument thusly:

> "Looking first to the statutory language defining the relief available, we note that Congress specifically provided for both 'legal or equitable' relief in the ADEA, but did not authorize 'legal' relief in so many words in Title VII. * * * . . . the availability of back pay is a matter of equitable discretion. . . ." *Ibid.* at 197.

Thus, while this Court has not specifically decided the scope of monetary relief under Title VII, it has indicated that Title VII relief is limited to equitable relief. In this regard, the decision of the Court of Appeals is in harmony with applicable decisions of this Court.

At pages 8 and 9 of the Petition, Petitioner criticizes the Court of Appeals for adopting the rationale of *Van Hoomissen v. Xerox Corp.*, 368 F. Supp. 829 (N.D. Cal. 1973), insofar as it used the National Labor Relations Act, 29 United States Code §§151 *et seq.* (NLRA) for a model in determining the scope of relief available under Title

VII. In making that criticism, Petitioner implies that such a use of the NLRA was in conflict with this Court's comments in *Franks v. Bowman Transportation Co., supra.* The Petitioner's characterization of the holding in *Franks v. Bowman Transportation Co.* is misleading and patently inaccurate. In that case, this Court did not "reject strict adherence" to the NLRA as a model for interpreting the relief available under Title VII. On the contrary, this Court recognized that §160(c) of the NLRA was the model for, and was a particularly valuable tool, in determining the relief available under §706(g) of Title VII. 424 U.S. at 769 and 774. In fact, the majority criticized the dissent for not adequately treating the standards under the NLRA as a model for fashioning Title VII relief. 424 U.S. at 774, n.34.

The fact that *Van Hoomissen* was decided before *Franks v. Bowman* would seem irrelevant in light of the fact that this Court has used the NLRA as a model in applying Title VII in decisions both before and after *Franks v. Bowman. See, Albemarle Paper Co. v. Moody, supra,* 419; and *International Brotherhood of Teamsters v. United States, supra,* 366.

The misleading nature of Petitioner's presentation of *Franks v. Bowman* is further demonstrated by the convenient deletion of certain limiting language. After noting the 1972 amendments to Title VII §706(g), this Court concluded that the addition of the phrase "any other equitable relief as the court deems appropriate" in §706(g) serves as an ". . . emphatic confirmation that the federal courts are empowered to fashion such relief as the particular circumstances of a case may require *to effect restitution,* . . .". 424 U.S. at 764. The italicized portion of the above quote is significantly absent from Petitioner's quotation of the identical passage. Petitioner ignores that language and then argues that *Franks v. Bowman* stands for the proposition that a court may fashion whatever relief it desires, including money damages not related to back pay. However, the italicized language indicates that this Court had equitable remedies in mind when it described the power of federal courts to fashion relief under Title VII 706(g). In fact, the entire discussion of remedies in *Franks v. Bowman* is pervaded with comments about the court's *equitable* powers and *equitable* discretion. 424 U.S. at 764-770. To like effect, see, *Albemarle Paper Co. v. Moody, supra,* 416-421; and *International Brotherhood of Teamsters v. United States, supra.*

Thus, contrary to what the Petitioner would lead this Court to believe, the decision of the Court of Appeals in the instant case, as well as the decision in *Van Hoomissen,* is in harmony with and does not conflict with *Franks v. Bowman* or any other applicable decision of this Court.

2. The Decision of the Court of Appeals Does Not Conflict With the Decisions of Other Courts of Appeals As to the Availability of Monetary Relief Other Than Back Pay Under Title VII

At page 9 of her Petition, Petitioner argues that "the Sixth Circuit ignored circuit court authority which awarded compensatory relief other than back pay," citing *Evans v. Sheraton Park Hotel,* 503 F.2d 177 (D.C. Cir. 1974); *Rutherford v. American Bank of Commerce,* 565 F.2d 1162 (10th Cir. 1977), *aff'g* 11 EPD ¶10,829 (D. N.M. 1976); and *Rosen v. Public Service Electric and Gas Co.,* 477 F.2d 90 (3rd Cir. 1973). As the following will demonstrate, Petitioner has again inaccurately represented the holdings of case law.

It is true that in *Evans v. Sheraton Park Hotel, supra,* the court of appeals affirmed the district court's ruling which awarded $1100.00 for discriminatory job assignments

and $500.00 for harassment. Petitioner indicates that "the $1100.00 might be viewed as back pay in the nature of lost earnings." Actually, there is no doubt that the $1100.00 was in the nature of back pay for the Court stated that "having found [violations of Title VII] vests in the district court discretionary authority to order, as part of the affirmative action necessary to obviate such unlawful employment practices, that the party responsible pay to the aggrieved person *back pay damages* calculated to restore such person to his or her rightful economic place. 'The demand for back pay is not in the nature of a claim for damages, but rather is an integral part of the statutory *equitable* remedy, to be determined through the exercise of the court's discretion.'" *Ibid.* 186 (emphasis added; citations omitted).

As for the $500.00 award for harassment, it is clear that the propriety of granting such damages was not an issue on appeal. The district court, without discussion or citation of authority, awarded $500.00 against only one of the defendants, the hotel. (See, *Evans v. Sheraton Park Hotel*, 5 EPD ¶8079 (D. D.C. 1972).) Since the hotel did not appeal (see, 503 F.2d 177, 180 n.1), the court of appeals never really decided the issue.

Furthermore, it is difficult to see how Petitioner can characterize $500.00 for harassment as "compensatory relief other than back pay," especially in light of later cases from the District Court for the District of Columbia. In *Dual v. Griffin*, 446 F. Supp. 791, 800-1, n.40 (D. D.C. 1977), the court noted that it was doubtful that *Evans* could be read as permitting compensatory damages. Moreover, in *Saad v. Burns Intern. Sec. Services, Inc.*, 456 F. Supp. 33, 37 (D. D.C. 1978), the court held that compensatory and punitive damages were not available under Title VII "by an overwhelming majority of the courts."

Petitioner argues that the Sixth Circuit decision conflicts with *Rutherford v. American Bank of Commerce*, 565 F.2d 1162 (10th Cir. 1977), *aff'g* 11 EPD ¶10,829. Contrary to the representations of Petitioner, *Rutherford* did not grant compensatory damages "where back pay was inappropriate." In *Rutherford*, the district court held that "[the plaintiff] requested an award of back pay; she is entitled to equitable relief more appropriately in the form of restitution for that which she would have received but for the unlawful acts of [plaintiff's former employer]." The district court observed that back pay was "not appropriate" due to the peculiar facts of the case, but it is clear from the method of calculating the plaintiff's recovery, that the award, though a form of restitution, was at least similar to back pay. Thus, *Rutherford* is no authority for the proposition cited by Petitioner.

Additionally, Petitioner implies that, since *Pearson v. Western Electric Co.*, 542 F.2d 1150 (10th Cir. 1976)—a case cited by the Sixth Circuit—predates *Rutherford*, it is no longer the law of the Tenth Circuit. Such an argument is without foundation. One of the direct issues decided in *Pearson* was the availability of compensatory and punitive damages in a Title VII action. After a careful and well reasoned discussion of the law, the court held that such damages were not available in a Title VII action, and accordingly denied the plaintiff's claim for compensatory damages for injury to plaintiff's credit standing and good character and also denied the claim for punitive damages. It is absolutely inconceivable that the Tenth Circuit would overrule a case barely a year old without even discussing it. Moreover, as noted above, the availability of compensatory and/or punitive damages was not an issue and was not discussed in *Rutherford*.

Finally, Petitioner asserts that the Sixth Circuit decision conflicts with *Rosen v. Public Service Electric and*

Gas Co., 477 F.2d 90 (3rd Cir. 1973). It is true that *Rosen* itself describes the relief awarded as "compensatory damages." However, the court noted that "the relief is intended to restore those wronged to their rightful economic status absent the effects of the unlawful discrimination." *Ibid.*, 96. An analysis of *Rosen* indicates that the relief awarded therein was actually in the nature of back pay. See, *Loo v. Gerarge*, 374 F. Supp. 1338, 1342, n.7 (D. Hawaii 1974); and, *Dual v. Griffin, supra*, 800-1, n.40. Furthermore, district courts within the Third Circuit have noted that *Rosen* does not support the contention that general compensatory damages are available in a Title VII action. E.g., *Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists*, 401 F. Supp. 1363, 1371, n.6 (S.D. N.Y. 1975).

Finally, in *Richerson v. Jones*, 551 F.2d 918 (3rd Cir. 1977), the court held that punitive damages were not available under Title VII, and went on to explain and distinguish its previous holding in *Rosen*:

> "Finally, we are aware that in *Rosen v. Public Service and Gas Co.*, 477 F.2d 90, 96 (3rd Cir. 1973), this Court stated that plaintiffs who were denied pension benefits because of sex discrimination could recover 'compensatory damages' under Title VII. While *Rosen* referred to compensatory, rather than punitive damages, it could be argued, inasmuch as both types of damages are legal in character, that this Court in *Rosen* extended the 'equitable relief' of the statute to forms of legal relief. Such an interpretation or 'extension' is unwarranted. *Rosen* was unquestionably correct in concluding that wrongfully withheld pension benefits could be recovered under Title VII, but as the Supreme Court made clear in *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416-17, 95 S. Ct. 2362, 45 L. Ed. 2d 280 (1975), that recovery is actually a form of equitable restitution rather than a form of legal damages." *Ibid.*, 926-927, n.13.

Thus, the Third Circuit itself has declared that Petitioner's interpretation of *Rosen* is unwarranted.

Other than the three cases cited by Petitioner and discussed above, Respondent's diligent research has revealed no other circuit court decision that even gives the appearance of allowing monetary relief other than back pay, i.e., general compensatory damages. Indeed, every circuit court that has dealt with the precise issue has ruled that such damages are not available under Title VII. *Richerson v. Jones, supra; Pearson v. Western Electric Co., supra.* Also, see, *Garner v. Giarrusso*, 571 F.2d 1330 (5th Cir. 1978), *reh. den.* 575 F.2d 300. Additionally, the question has arisen in the context of whether a Title VII party has the right to jury trial. In *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122 (5th Cir. 1969), the Court held there was no right to jury trial insofar as the relief under Title VII was not in the nature of damages, but rather it is equitable. Likewise, in *Harmon v. May Broadcasting Company*, 583 F.2d 411 (8th Cir. 1978), the court ruled there was no right to jury trial under Title VII on the ground that the remedies available are equitable and not comparable to the damages available in a common law action, citing, *inter alia*, *E.E.O.C. v. Detroit Edison Co.*, 515 F.2d 301, 308-9 (6th Cir. 1975), *vacated on other grounds* 431 U.S. 951 (1977). It is interesting to note that in the pages of *E.E.O.C. v. Detroit Edison Co.* referred to, the Sixth Circuit had observed that compensatory and punitive damages were not available under Title VII.

Thus, the decision of the Sixth Circuit in the instant case is not in conflict with the decisions of any other circuit. Indeed, it is in agreement and harmony with such decisions.

3. The Court of Appeals Has Not Decided a Question of Federal Law Which Deserves Further Elucidation by This Court

At pages 10 and 11 of the Petition, Petitioner somewhat obliquely suggests that this Court should settle an important question of Federal Law, because there is a conflict among the circuits and confusion among the district courts. However, as demonstrated above, there is no conflict among the circuit courts concerning the availability of monetary relief other than back pay in a Title VII case.

The cases cited by the Petitioner at page 10 of the Petition do not demonstrate a *present* state of confusion among the district courts on the issue. In light of the Sixth Circuit decision in the instant case, it is difficult to see how either *Compston v. Borden, Inc.*, 424 F. Supp. 157 (S.D. Ohio 1976) or *Hyland v. Kenner Products Co.*, 13 FEP Cases 1309 (S.D. Ohio 1976) can be the source of any further confusion in the Sixth Circuit. Similarly, *Tooles v. Kellogg Co.*, 336 F. Supp. 14 (D. Neb. 1972) should pose no difficulty in light of *Harmon v. May Broadcasting Co., supra. Curran v. Portland Superintending School Committee*, 435 F. Supp. 1063 (D. Me. 1977) simply joined "the clear majority" in denying compensatory and punitive damages. Also, *Tidwell v. American Oil Co.*, 332 F. Supp. 424 (D. Utah 1971) should pose no source of confusion in light of that court's later clarification in *Jiron v. Sperry Rand Corp.*, 423 F. Supp. 155 (D. Utah 1975), wherein the court rejected claims for compensatory and punitive damages as unavailable under Title VII. The court distinguished the award in *Tidwell* as being in the nature of back pay. Furthermore, since Utah is within the Tenth Circuit, any doubt created by *Tidwell* would seem to be removed by the holding in *Pearson v. Western Electric Co., supra.* Finally, *Humphrey v. Southwestern Portland Cement Co.*, 369 F. Supp. 832 (W.D. Tex. 1973) would seem to be questionable authority at best since it was reversed on the merits, 488 F.2d 691 (5th Cir. 1974) and in light of the Fifth Circuit's observations in *Garner v. Giarrusso, supra.*

That little confusion exists is aptly demonstrated by the oft-cited treatise SCHLEI & GROSSMAN, EMPLOYMENT DISCRIMINATION LAW (1976) wherein it is broadly stated at page 1258, that "neither compensatory nor punitive damages are recoverable under Title VII."

Respondent submits that the near unanimity among all federal courts demonstrates that this Court has already supplied sufficient direction in this area of the law by its decisions in *Curtis v. Loether, supra*; *Albermarle Paper Co. v. Moody, supra*; *Franks v. Bowman Transportation Co., supra; International Brotherhood of Teamsters v. United States, supra*; and *Lorillard v. Pons, supra*; and that further elucidation by this Court is unnecessary.[2]

4. The Decision of the Court of Appeals Does Not Conflict With the Decisions of This Court nor With Decisions of Other Courts of Appeals As to Whether Petitioner Was a Prevailing Party

The Sixth Circuit held that "in order to be a 'prevailing party,' a plaintiff must have been entitled to some form of relief at the time suit was brought" (Appendix at p. A20). Petitioner argues that such a holding conflicts

---

2. Petitioner argues that the purposes of the Act, will be frustrated by the "constricted inflexible standard" of relief adopted by the Sixth Circuit (Petition, p. 10). It is a highly novel—though incredible—argument that equitable remedies constitute a "constricted inflexible standard."

Additionally, Petitioner makes a desperate plea by arguing that she has been injured but is left without a remedy (Petition p. 11). However, that is not what the Sixth Circuit held. The court's holding was that if Petitioner was injured, wherever her remedy may be, it was not within Title VII.

with this Court's holding in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). However, it is clear, as Petitioner admits, that *McDonnell Douglas* set forth those elements which a plaintiff must show in order to make out a *violation* of Title VII. That is, *McDonnell Douglas* was not concerned with defining "prevailing party." Respondent admits that the central focus of Title VII litigation is whether or not an employer is treating some employees less favorably than other employees because of, *inter alia*, sex. However, Respondent is unaware of any court ruling that proof of a violation in and of itself establishes that a plaintiff is entitled to back pay, reinstatement, injunction, or any other relief permissible under the Act. As noted by the Sixth Circuit and numerous other courts, there are instances where certain types of relief are not appropriate and it is up to the Title VII plaintiff to show just what relief should be granted.

In this regard, Petitioner's citation of *Kober v. Westinghouse Electric Corp.*, 480 F.2d 240 (3rd Cir. 1973) is irrelevant. The plaintiff in *Kober* was not declared a prevailing party in either the statutory or any other sense. In fact, the phrase "prevailing party" is nowhere to be found in *Kober* at all. Thus, the Petitioner has failed to cite even a single case which conflicts with the Sixth Circuit definition of a "prevailing party."

Moreover, the Sixth Circuit's ruling is in accord with numerous decisions which hold that a plaintiff is a prevailing party if he succeeds on the merits *and* obtains some type of relief or at least causes the removal or end to discriminatory practices. E.g., *Taylor v. Safeway Stores, Inc.*, 524 F.2d 263, 273 (10th Cir. 1975); *Rosenfeld v. Southern Pac. Co.*, 519 F.2d 527, 529 (9th Cir. 1975); also see, *Christianburg Garment Co. v. E.E.O.C.*, 434 U.S. 413 (1978); and *Lea v. Cone Mills Corporation*, 438 F.2d 86, 88 (4th

Cir. 1971). In this same regard, it is interesting to note that in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51, n.14 (1974), this Court observed that where relief is not available under Title VII, an employee has no need to file a Title VII lawsuit.[3]

5. The Decision of the Court of Appeals Does Not Conflict With the Decisions of This Court Regarding the Availability of Declaratory Relief Under Title 28 United States Code §§2201 and 2202

The Petitioner argues that the Sixth Circuit erred in ignoring the availability of declaratory relief when it ruled that Petitioner was not a "prevailing party." Again, the cases cited by the Petitioner are of little value, if any. On the other hand, this Court has previously ruled that declaratory relief under 28 U.S.C. §§2201 and 2202 should not be granted where a special statutory proceeding, like the Civil Rights Act, has been provided. *Katzenbach v. McClung*, 379 U.S. 294, 296 (1964). Also see, Notes of the Advisory Committee on Federal Rules of Civil Procedure 57. Several district courts have applied *Katzenbach* in denying such relief in Title VII actions. E.g., *Budinsky v. Corning Glass Works*, 425 F. Supp. 786, 789 (W.D. Pa. 1977).

---

3. Petitioner asserts that relief is available under the Federal Declaratory Judgment Act (Petition, p. 12, n.6). Respondent's reply thereto follows below in Reason 5 for Denying the Writ. Additionally, Petitioner asserts that she is entitled to an injunction ordering the expungement of the 18 unsatisfactory performance reviews from her personnel file. Such is doubtful for several reasons. First, neither of the lower courts found that the reviews constituted retaliation or otherwise were violations of Title VII. The trial court found discrimination based solely on a difference in working conditions. Secondly, as noted above in note 1, the trial court did not connect any of Respondent's conduct with discriminatory motive. Finally, the Petitioner did not appeal the trial court's failure to grant such an injunction, and in fact, until now, Petitioner has not argued for such relief.

Furthermore, Respondent submits that it would be improvident to grant a writ of certiorari on this ground asserted by Petitioner for two other reasons:

(1) The Petitioner did not appeal the failure of the trial court to grant such relief and, therefore, she should not be permitted to argue that now; and

(2) The admitted facts show that such relief would serve no useful purpose, there being no *existing* controversy between the parties so as to cause uncertainty with respect to their rights.

6. The Decision of the Court of Appeals Does Not Conflict With the Decisions of This Court Regarding the Imposition of Costs on Appeal

Petitioner argues that the Sixth Circuit's comments regarding "fruitless litigation" are in conflict with this Court's recent ruling in *Christianburg Garment Co. v. E.E.O.C.*, 434 U.S. 413 (1978). However, Petitioner's reliance on *Christianburg Garment Co.* is misplaced. In that case, this Court held that *attorney fees* could not be awarded in favor of defendants who prevailed in Title VII ligitation unless the plaintiff's action was frivolous, in bad faith, etc. On the other hand, the Sixth Circuit's ruling did not award attorney fees *against Petitioner*—it refused to award attorney fees *in her favor*. The Sixth Circuit correctly observed that the practice of awarding attorney fees to plaintiffs who could show a violation of the Act, but who were not entitled to relief, would only encourage "fruitless litigation."

Petitioner implies that the Sixth Circuit taxed costs against her because her litigation was "fruitless." However, that was not the holding of the Sixth Circuit. As admitted by Petitioner at page 7 of her petition, the costs

of appeal (vis-a-vis, the entire case) were taxed to Petitioner pursuant to Rule 39(a) Federal Rules of Appellate Procedure. That rule states that the costs of *appeal* are taxed against the appellee where a judgment is reversed.

Petitioner further argues that the taxing of appeal costs against Title VII plaintiffs who fail to obtain any form of relief will erode established federal policy favoring private enforcement. However, it is difficult to see how such a procedure will discourage plaintiffs from bringing suit in the first instance. The costs are assessed only if the plaintiff loses on appeal. Such a procedure is no more a discouragement to Title VII plaintiffs than to any other type of plaintiff. One might as well argue that since a plaintiff's judgment might be reversed on appeal, one is discouraged from filing any type of lawsuit, and therefore, we should abolish appellate courts altogether in order to encourage plaintiffs.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit should be denied.

Respectfully submitted,

LARRY A. SMITH
MICHAEL J. BURDGE
1400 One First National Plaza
P.O. Box 910
Dayton, Ohio 45402
513-224-1981
Attorneys for Respondent